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Nos. 85-1219, 85-1236, 85-1237, 85-1250 and 85-1252.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

TRANSWESTERN PIPELINE COMPANY, *et al.*,
Petitioners,

VS.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT SOUTHERN CALIFORNIA GAS COMPANY IN OPPOSITION TO PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission (Commission) has the authority under Section 5 of the Natural Gas Act to modify tariff provisions when the Commission finds that those tariff provisions have anti-competitive effects.

2. Whether the Commission's notice and comment procedures in a formal rulemaking proceeding satisfy the requirements of the Natural Gas Act.

3. Whether the Commission's finding that minimum commodity bill and minimum take provisions in tariffs have anti-competitive effects was supported by substantial evidence.

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Natural Gas Act, 15 U.S.C. §§ 717-717w (1982) . . *passim*

LIST OF PARENT, SUBSIDIARIES AND AFFILIATES

Southern California Gas Company (SoCalGas) is a wholly-owned subsidiary of Pacific Lighting Corporation. The following are the parent, subsidiaries and affiliates of SoCalGas:

Ankirk
Blackfield Hawaii Corporation
California LNG Company
Carmel Mountain Properties
Central Plants, Inc
Dual Fuel Systems, Inc.
Dunn Properties Corporation
Dunn Properties of Georgia, Inc.
Dunn Properties of Texas, Inc.
Fredericks Sales, Inc.
Fredricks Development Corporation
Fuel Industries New Zealand Limited
Hawaii Management Corporation
Mayflower Realty Associates, Inc.
Modular Products, Inc.
Nellie Gail Ranch Recreation Company
Pacific Alaska LNG Company
Pacific Center Downtown, Inc.
Pacific Energy Resources Incorporated
Pacific Gas Gathering Company
Pacific Geothermal Company
Pacific Hydropower Company
Pacific Indonesia LNG Company
Pacific Interstate Company
Pacific Interstate Mojave Company
Pacific Interstate Offshore Company
Pacific Interstate Transmission Company
Pacific Interstate Transmission Company (Arctic)

Pacific Lighting Bio-Energy Company
Pacific Lighting Capital Company N.V.
Pacific Lighting Commercial Loans, Inc.
Pacific Lighting Corporation
Pacific Lighting Energy Systems
Pacific Lighting Exploration Company
Pacific Lighting Gas Development (Canada) Ltd.
Pacific Lighting Gas Development Company
Pacific Lighting International Finance N.V.
Pacific Lighting Land Company
Pacific Lighting Leasing Company
Pacific Lighting Marine Company
Pacific Lighting Oil and Gas Company
Pacific Lighting Overseas Finance N.V.
Pacific Lighting Properties, Inc.
Pacific Lighting Real Estate Group
Pacific Lighting Securities Company
Pacific Offshore Pipeline Company
Pacific Oroville Power, Inc.
Pacific Synthetic Fuel Company
Presley ASW Finance Co., Inc.
Presley Chicago, Inc.
Presley Company East, Inc.
Presley Company of New Mexico
Presley Development Company of Arizona
Presley Financial Corporation
Presley-Home Mac Finance Co., Inc.
Presley of Northern California
Presley of San Diego
Presley of Southern California
Sabagli N.V.
S. M. Dunn, Inc.
SMA Development Corporation
Southern California Conservation Financing Company

Southern California Gas International Finance N.V.
Southern California Solar Financing Company
Terra Resources, Inc.
The Presley Companies
Western LNG Terminal Company
Western Power, Inc.

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BRIEF OF RESPONDENT SOUTHERN CALIFORNIA GAS COMPANY IN OPPOSITION TO PETITIONERS

Respondent, Southern California Gas Company (SoCalGas),[1] respectfully requests that this Court deny the Petitions for Writ of Certiorari, seeking review of the District of Columbia Circuit Court of Appeals' opinion in this case. App. at 1.[2] This case involves no conflict between the Circuits, raises no Constitutional question, and

[1]SoCalGas and its affiliate, Pacific Lighting Gas Supply Company (PLGS), were parties below. Recently, SoCalGas and PLGS merged and are operating under the name of SoCalGas.

[2]The appendix references are to the appendix filed with this Court by Transwestern Pipeline Company.

involves no significant issue concerning the administration of the Natural Gas Act. 15 U.S.C. §§ 717-717w (1982).

STATEMENT OF THE CASE

This case involves the Federal Energy Regulatory Commission's (Commission) promulgation of a rule which eliminates non-incurred variable gas costs from the tariffs of interstate pipelines. Under the rule, the pipelines continue to collect, unchanged, the fixed costs in their tariffs. These fixed costs include the non-gas costs of a pipeline such as wages, operation and maintenance expenses, depreciation and return on rate base. The pipelines also continue to collect the gas costs which they incur for the gas they sell. However, pipelines can no longer bill and collect from their customers for gas costs which they do not incur.

The Commission has applied this rule to both minimum commodity bills and minimum take provisions. Minimum commodity bills require customers of pipelines to pay for minimum quantities of gas whether or not it is taken. Minimum take provisions are even more restrictive, requiring customers of pipelines to actually take a minimum quantity of gas whether or not they want it. Both of these minimum bill provisions severely restricted a customer's discretion in making purchases.

Six natural gas pipeline companies have filed Petitions with this Court to seek review of a unanimous decision of the Court of Appeals for the District of Columbia Circuit which affirmed the Commission's Orders in all respects, except one which is not a subject of these Petitions.[3]

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[3]Petitions have been filed by Transwestern Pipeline Company (Transwestern) (No. 85-1219); ANR Pipeline Company (ANR) (No. 85-1236); Texas Eastern Transmission Corporation (Texas Eastern)

Petitions for Rehearing were denied by the Court of Appeals, with no member requesting the taking of a vote on the Petitions. App. at 69, 70.

SoCalGas is a natural gas distribution company which provides natural gas service in southern and central California. SoCalGas is the largest natural gas distribution company in the country having more than 4.0 million customers and providing natural gas service to a population of approximately 13.0 million. SoCalGas purchases natural gas from a number of interstate pipeline companies including Transwestern Pipeline Company (Transwestern), one of the Petitioners before this Court.

Under the provisions in Transwestern's tariff, SoCalGas had the annual obligation to take or pay for 91 percent of a contract quantity of 750,000 Mcf of gas per day. Transwestern's tariff provisions also required that SoCalGas actually take from Transwestern, regardless of its need and regardless of the cost, on a daily basis, 80 percent of the contract quantity of 750,000 Mcf or 600,000 Mcf of gas. If SoCalGas did not need this volume of gas on a daily basis it was still required to take such volumes.

The Commission's Order Nos. 380, 380-A, 380-B, 380-C and 380-D[4] relieved SoCalGas of these severe tariff restrictions and allowed it to purchase gas based upon relative cost rather than these tariff provisions.[5]

(No. 85-1237); Trunkline Gas Company and Panhandle Eastern Pipeline Company (No. 85-1250); and Arkla Energy Resources (Arkla) (No. 85-1282).

[4]These orders are referred to in this brief as "Order No. 380."

[5]It should be noted that other provisions in Transwestern's tariff relieve Transwestern of the obligation to provide the contracted quantity of gas during periods when gas is unavailable. These tariff provisions which were placed in Transwestern's tariff long after Transwestern's contract was signed with SoCalGas were approved by

The Commission's intention of promoting competition among interstate pipelines in issuing Order No. 380 has had its desired effect. For example, Transwestern which at the time of the issuance of Order No. 380 was a higher priced supplier to SoCalGas, has, in response to competition generated by Order No. 380, become the low price leader of the suppliers to southern California.[6] As the result of discretionary actions which Transwestern has taken, it has significantly reduced its commodity rate to SoCalGas. The ratepayers of SoCalGas are the ultimate beneficiaries of this reduction.

REASONS WHY THE WRIT SHOULD BE DENIED

I

The Court's Decision Below Follows An Unbroken Line Of Authority In Finding That The Commission Acted Within Its Authority To Modify Tariffs And Contracts Under Section 5 Of The Natural Gas Act.

Petitioners here launch what the Court below termed a "barrage of attacks upon the Commission's authority to issue Order No. 380." App. at 25. The Commission's authority to act under Section 5 of the Natural Gas Act, 15 U.S.C. § 717d (1982), is so clear, and the arguments by

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the Commission and upheld by the Ninth Circuit Court of Appeals in *Pacific Lighting Service Co. v. FPC,* 518 F.2d 718 (9th Cir. 1975).

[6]Prior to the effective date of Order No. 380, Transwestern's commodity rate of $3.85/MMBtu was significantly higher than the $3.57/MMBtu commodity rate of El Paso Natural Gas Company (El Paso), which is Transwestern's major competitor in the southern California market. *Compare Transwestern Pipeline Co.*, 26 FERC ¶ 61,424 (1984) with *El Paso Natural Gas Co.*, 26 FERC ¶ 61,423 (1984). Currently Transwestern's commodity rate is $2.87/MMBtu compared to El Paso's current commodity rate of $2.98/MMBtu. *Compare Transwestern Pipeline Co.*, 34 FERC ¶ 61,201 (1986) with *El Paso Natural Gas Co.*, 34 FERC ¶ 61,171 (1986).

the Petitioners are so tenuous, that the Court below found that the Petitioners' claims concerning the Commission's authority to act were either "frivolous" or "completely without merit." App. at 25.

Simply put, an argument cannot credibly be made that the Commission exceeded its authority in issuing Order No. 380. Section 5 of the Natural Gas Act empowers the Commission upon finding "that any rate, charge, or classification . . . or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential" to determine the just and reasonable rate or contract and to fix that rate or contract by order. 15 U.S.C. § 717d(a). The Court below, in citing to this Court's decision in *Permian Basin Area Rate Cases*, 390 U.S. 747, 783-84 (1968), stated, "At any rate, Section 5 gives the Commission authority to alter terms of any existing contract found to be 'unjust' or 'unreasonable' ". App. at 25-26.

In fact, Petitioners acknowledge that the Commission is authorized under Section 5 of the Act to modify contracts and tariffs. *See* Transwestern's Petition at 9, Texas Eastern's Petition at 11. Petitioners cite no case which challenges the Commission's authority to modify tariffs or contracts. Instead, Petitioners argue that the Commission exceeded its authority because it did not fully consider the role of contracts under the Natural Gas Act or that the provisions of Order No. 380 destroy the mutuality of contracts. In essence, these arguments by Petitioners, while termed to be challenges to the statutory authority of the Commission to issue its Order, are in reality merely disagreements with the Commission's weighing of the various factors which were considered in issuing its decision. The role of this Court is not to weigh the individual factors in evidence but to defer to the

expertise of the administrative agency in considering the evidence before it. *Permian Basin,* 390 U.S. 747 (1968).

II

The Court's Decision Below Does Not Raise Certain Of The Questions Presented In The Petitions.

Petitioners have raised for review certain issues which were not the holding in the decision of the Court below. First, Petitioners question if the Commission is authorized to abrogate a settlement agreement which was previously approved by the Commission. Second, Petitioners question if the Commission is authorized to modify or revoke a certificate of public convenience and necessity issued under Section 7 of the Natural Gas Act, 15 U.S.C. § 717f (1982). The District of Columbia Circuit Court of Appeals either did not decide these issues or did not base its decision upon such finding. Moreover the facts below indicate there was no violation of a settlement or revocation of a certificate.

A Petitioner, ANR, contends that the Commission has exceeded its statutory authority by abrogating a settlement agreement to which the Commission was a party. The District of Columbia Circuit however did not decide this issue. The Court below stated, "We find that Order No. 380 does not violate any term of either Transco's or ANR's settlement. We therefore do not reach the issue of whether the Commission has the statutory authority to abrogate settlement agreements to which it is a party through a generic section 5 rulemaking." App. at 26.

Moreover, the record in this proceeding does not permit the formulation of a resolution of this question presented by the Petitioner. The underlying settlement merely provides that the minimum bill issue shall be set for hearing in Docket No. RP82-80. (ANR attachment I at

B-1). In discussing this settlement the Court below found that the Commission was not restricted in dealing with ANR's minimum bill in an ongoing rulemaking. The Court stated, "As it is written, however, the agreement neither binds the Commission to resolve the issues in ANR's ratemaking proceeding nor exempts ANR's minimum bill provisions from the general rulemaking in progress. We conclude, therefore, that by issuing Order No. 380 the Commission did not violate the terms of the settlement agreement." App. at 29.

Petitioners, Transwestern and Arkla, claim that the Commission was without authority to revoke or modify certificates of public convenience and necessity granted under Section 7 of the Natural Gas Act. 15 U.S.C. § 717f. While the Court found that the Commission did have the authority to modify certificates, its holding was not based upon this finding. The Court below, citing this Court's decision in *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 389 (1959), found that Section 7 of the Natural Gas Act does not guarantee a recipient of a certificate that the initial terms of the certificate will never be changed. The Commission has the authority under Section 5 of the Natural Gas Act, 15 U.S.C. § 717d, to alter and amend terms and conditions of certificated service. *Pacific Gas Transmission Co. v. FPC*, 536 F.2d 393 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 999 (1976). In fact, once the Commission determines a term or condition is unjust and unreasonable it must remedy the situation. *American Smelting and Refining Co. v. FPC*, 494 F.2d 925 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 882 (1974); *Pacific Gas Transmission Co. v. FPC,* 536 F.2d 393 (D.C. Cir. 1976).

The decision of the Court below would not change even if its determination is incorrect since the Court found that the Commission's decision did not revoke or modify

the Section 7 certificates of Petitioners. The Court stated:

> Even assuming *arguendo* that the Commission has no authority to amend or revoke certificated service in a Section 5 proceeding, the elimination of minimum bills has no effect on the pipelines *authorized* service. The Order merely addresses the *rates* the pipeline may charge its customers and therefore was properly issued pursuant to Section 5.

App. at p. 25, n.9 (emphasis in original). Thus, the issues which Petitioners have asked this Court to review are simply not material to the decision of the Court below.

III

As The Court Below Found, The Commission Utilized The Proper Procedures And Therefore There Is No Reason For This Court To Grant The Writ For Certiorari.

Petitioners argue that the rulemaking procedures used by the Commission in this case were insufficient to satisfy the hearing requirement of Section 5 of the Natural Gas Act. The statutory requirement for a hearing can be satisfied through either a rulemaking proceeding or an adjudicatory proceeding. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *Phillips Petroleum Co. v. FPC*, 475 F.2d 842 (10th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974). In this case, the Commission within its discretion, utilized its rulemaking procedures. The Court below found that the Commission's decision to proceed through rulemaking, "clearly passes muster under our deferential standard of review." App. at 51. *See, FPC v. Transcontinental Gas Pipeline Corp.*, 423 U.S. 326, 333 (1976).

The use of notice and comment procedures by the Commission was an appropriate method to acquire information on an industry-wide problem. *See, United States v.*

Florida East Coast Ry. Co., 410 U.S. 224, 245 (1973). The fact that 95 parties submitted over 1,000 pages of comments in response to the Commission's first notice of proposed rulemaking indicates that the Commission's proposed rulemaking was not a matter that uniquely or exceptionally affected only a few parties. A review of the two series of comments and reply comments filed with the Commission reveals that all sectors of the natural gas industry took the opportunity to make their views known and address the arguments raised by other parties.

The repeated notices and comments which characterize this proceeding demonstrate the thorough procedures used by the Commission. As this Court has stated, and as noted by the Court below, App. at 54, nothing permits "the court to review and overturn the rulemaking proceeding on the basis of the procedural devices employed (or not employed) by the Commission so long as the Commission employed at least the statutory minima." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 548 (1978). There is no doubt that the Commission has done so here.

IV

The Court's Decision Below Gave Full Consideration To The Issues And Determined That The Commission's Decision Was Based Upon Substantial Evidence.

Petitioners raise a wide-range of issues which, in essence, challenge the reasonableness of the Commission's Order. Pursuant to Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), the standard which is to be used by a Court in reviewing the Commission's factual findings is that of substantial evidence. *Public Service Commission of the State of NewYork v. FERC*, 642 F.2d 1335 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 879 (1981). The factual findings of the Commission are to be considered conclu-

sive if supported by substantial evidence. In this regard the Court is not to substitute its view of the facts for that of the Commission. *Colorado Interstate Gas Co. v. FPC*, 142 F.2d 943 (10th Cir. 1944), *aff'd.*, 324 U.S. 581 (1945), *reh'g denied*, 325 U.S. 891 (1945).

The Commission's examination of all aspects of this rule can only be described as overwhelming and conclusive. In fact, the reviewing Court below has so found. The Court's conclusion is illustrative in describing the breadth of the Commission's review where it states,

> In sum, we find that each of the order's essential elements is supported by substantial evidence. Since we have assured ourself "that the Commission has given reasoned consideration to each of the pertinent factors", it is not our province "to supplant the Commission's balance of these interests with one more merely to [our] liking", *Permian Basin*, 390 U.S. at 792.

App. at 42.

Thus, Petitioners' claims simply do not merit review by this Court.

CONCLUSION

For these reasons, the Petitions for a Writ of Certiorari should be denied.

Respectfully submitted,

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March 28, 1986